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12 *Westlands Water District*

13 UNITED STATES DISTRICT COURT

14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15 FRESNO DIVISION

17 HOOPA VALLEY TRIBE,

18 Plaintiff,

19 v.

20 UNITED STATES BUREAU OF
21 RECLAMATION, et al.,

22 Defendants,

23 And

24 WESTLANDS WATER DISTRICT,

25 Intervenor-Defendant.

Case No. 1:20-cv-01814-JLT-EPG

**WESTLANDS WATER DISTRICT'S
REQUEST FOR LEAVE TO FILE
BRIEF AND PROPOSED BRIEF IN
RESPONSE TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: March 20, 2023
Time: 9:00 a.m.
Courtroom: 4 – 7th Floor, Fresno
Judge: Hon. Jennifer L. Thurston

Trial Date: None
Action Filed: August 13, 2020

**REQUEST FOR LEAVE TO FILE BRIEF IN RESPONSE
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Intervenor Defendant Westlands Water District ("Westlands") submits this Request for Leave to file a short response brief (attached below) to Plaintiff Hoopa Valley Tribe's ("Plaintiff's") third Motion for Preliminary Injunction ("Motion"), ECF No. 146-1. On February 27, 2023, in accordance with Local Rule 230(c), Westlands filed a Preliminary Response, ECF No. 148, to Plaintiff's Motion. In its Preliminary Response, Westlands noted that, though Plaintiff's Motion does not relate to and does not challenge the validity of the Water Infrastructure Improvements for the Nation Act repayment contracts between Reclamation and Westlands, Westlands does have interests in the management of Central Valley Project operations and releases of water from the Lewiston Dam in accordance with the 2000 Trinity River Record of Decision ("2000 ROD") that could potentially be impacted by a decision on Plaintiff's Motion.

Since no staggered briefing schedule was established prior to the filing of Plaintiff's Motion, Westlands was unable to review Federal Defendants' Response in Opposition to the Motion ("Opposition"), ECF No. 149, prior to filing. Thus, in accordance with the Court's admonitions that "Westlands' participation in the case is conditioned on it making every effort to avoid duplicative briefing," ECF No. 116, at 9, Westlands reserved the right to seek leave of the Court to submit a briefing containing any necessary non-duplicative points or arguments not made by Federal Defendants.

After reviewing Federal Defendants' Opposition, Westlands seeks to express its position on the following point made on page 7 of the Opposition:

Plaintiff has admitted and Federal Defendants acknowledge that there are additional sources of water that Reclamation could use in the spring and summer if the volume of ROD water remaining after the Winter Flow Project is not sufficient to affect the goals of restoration. *See* ECF No. 110-1 at 4 (Plaintiff claims that Reclamation can use 1955 Act Proviso 1 and Proviso 2 water to provide additional releases beyond that contemplated by the 2000 ROD). So, per Plaintiff's own admission, Federal Defendants could release additional water if there proved to be insufficient water in the spring and summer to meet Federal Defendants' statutory obligations to protect and propagate fish populations.

1 ECF No. 149, at 7.

2 The scope of Federal Defendants' authority to make additional releases for fishery
3 restoration purposes beyond the volumes provided for by the 2000 ROD is a disputed and
4 complex issue. Westlands' proposed brief, submitted below, clarifies its position that, though
5 there may be authority for Reclamation to release additional water in amounts beyond the
6 amounts established in the 2000 ROD for the benefit of fish in *non-Trinity River basin areas*,
7 there is no statutory authority to release water in amounts beyond the volume limits established
8 by the 2000 ROD for the benefit of fish in the Trinity River basin. Westlands requests that the
9 Court reach this issue only if it is essential to do so to resolve the Motion.

10 Westlands respectfully requests the Court grant leave for Westlands to file the short
11 attached brief clarifying Westlands' position on this issue and consider Westlands' position when
12 rendering its decision on the Motion.

13 Respectfully submitted,

14 Dated: March 1, 2023

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19 By: /s/ Cynthia J. Larsen

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Attorneys for Westlands Water District

**WESTLANDS' [PROPOSED] BRIEF IN RESPONSE
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Hoopa Valley Tribe's ("Plaintiff's") third Motion for Preliminary Injunction ("Motion"), ECF No. 146-1, argues that Defendants Bureau of Reclamation, *et al.* ("Federal Defendants")¹ did not comply with the National Environmental Policy Act ("NEPA") when they approved the Trinity River Winter Flow Variability ("WFFV") Project on January 30, 2023. Federal Defendants' Response in Opposition to the Motion ("Opposition" or "Opp."), ECF No. 149, argues that (A) Plaintiff has failed to identify any irreparable harm, (B) stopping the WFFV Project will cause harm to the environment outweighing any hypothetical harm claimed by Plaintiff, (C) Plaintiff is unlikely to succeed on the merits of its NEPA claim, and (D) the Motion is untimely.

Westlands takes no position at this time on these arguments, except with respect to one point made by Federal Defendants in support of their "irreparable harm" argument, for which Westlands seeks to clarify its position. On page 7 of their Opposition, Federal Defendants state the following:

Plaintiff has admitted and Federal Defendants acknowledge that there are additional sources of water that Reclamation could use in the spring and summer if the volume of ROD water remaining after the Winter Flow Project is not sufficient to affect the goals of restoration. *See* ECF No. 110-1 at 4 (Plaintiff claims that Reclamation can use 1955 Act Proviso 1 and Proviso 2 water to provide additional releases beyond that contemplated by the 2000 [Record of Decision ("2000 ROD")]. So, per Plaintiff's own admission, Federal Defendants could release additional water if there proved to be insufficient water in the spring and summer to meet Federal Defendants' statutory obligations to protect and propagate fish populations.

Opp. at 7.

The scope of Federal Defendants' authority to make additional releases for fishery restoration purposes beyond the volumes provided for by the 2000 ROD is a disputed and complex issue. Westlands' position is that, though there may be such authority for the release

¹ Plaintiff's Motion does not distinguish between Federal Defendants and Intervenor Defendant Westlands. Westlands presumes Plaintiff's references to Defendants' alleged NEPA violations are meant to refer to Federal Defendants, not Westlands.

1 additional water for the benefit of fish in *non-Trinity River basin areas*, there is no statutory
2 authority to release water in amounts beyond the amounts established by the 2000 ROD for the
3 benefit of fish in the Trinity River basin, which is the focus of the WFV.

4 Section 3406(b)(23)(A) of the Central Valley Project Improvement Act (“CVPIA”)
5 required the Secretary to develop recommendations “regarding permanent instream fishery flow
6 requirements and Trinity River Division operating criteria and procedures for the restoration and
7 maintenance of the Trinity River fishery.” The 2000 ROD contains those recommended flow
8 requirements and operating criteria and procedures. Section 3406(b)(23)(B) provides that if
9 Plaintiff concurred in those recommendations, which it did in 2000, those recommendations
10 “shall be implemented accordingly.” Thus, Federal Defendants’ compliance with the terms of the
11 2000 ROD is mandated by statute.

12 All parties agree that “[t]he amount of water provided by the ROD is expressly limited.”
13 Motion at 2; *see also* Opp. at 11, quoting 2000 ROD, ECF No. 111-2 at 12 (“the schedule for
14 releasing water on a daily basis, according to that year’s hydrology, may be adjusted *but the*
15 *annual flow volumes established in Table 1 may not be changed.*”) (Emphasis added). As stated
16 in the 2000 ROD, through the Variable Annual Flow Regime, “Reclamation will provide annual
17 instream flows below Lewiston Dam according to the recommendations provided in the [Trinity
18 River Flow Evaluation Study (“TRFES”)] and adopted in the [Final 1999 Environmental Impact
19 Statement/Environmental Impact Report (“FEIS/EIR”)] Preferred Alternative.” ECF No. 111-2,
20 at 12. The 2000 ROD goes on to state that, “[t]he total volume of water released from the TRD to
21 the Trinity River will range from approximately 369,000 af to 815,000 af, depending on the
22 annual hydrology (water-year type) determined as of April 1st of each year.” *Id.* (referencing
23 Table 1, Figure 1, and ROD Appendix B). Accordingly, while the timing of releases within the
24 year may be adjusted, the total annual volume cannot be exceeded, as doing so would go beyond
25 the amounts authorized in the ROD (and the amounts evaluated in the FEIS/EIR).

26 In the portion of Federal Defendants’ Opposition block-quoted above, they note that
27 “Plaintiff claims that Reclamation can use 1955 Act Proviso 1 and Proviso 2 water to provide
28

1 additional releases beyond that contemplated by the 2000 ROD.”² Opp. at 7 (citing June 18, 2021
2 comment letter from Hoopa Valley Tribe regarding TRRP proposed action, to ECF No. 110-1 at
3 4). Plaintiff’s comment letter referenced by Federal Defendants cites *San Luis & Delta-Mendota*
4 *Water Authority v. Haugrud*, 848 F.3d 1216, 1229-1232 (9th Cir. 2017) for the proposition that
5 “[i]n establishing the ROD restoration flows, with [Hoopa’s] concurrence, the Secretary did not
6 exhaust his or her authority to use Proviso 1 water for additional fishery preservation and
7 propagation activities.” This, however, is not a complete statement of the relevant holding in
8 *Haugrud*. The releases at issue in *Haugrud* were intended to help the lower Klamath River, not
9 the Trinity River. *Haugrud*, 848 F.3d at 1225-1226. The court held the releases were within the
10 Secretary’s authority under Proviso 1 of Section 2 of the 1955 Act to “adopt appropriate measures
11 to insure the preservation and propagation of fish and wildlife.” *Id.* at 1231. “Because the 2013
12 flow augmentation release sought to protect fish in the lower Klamath River, it did not violate
13 CVPIA section 3406(b)(23), which called for a permanent water release schedule that would
14 serve only the Trinity River basin.” *Id.* at 1235. Accordingly, *Haugrud* only endorsed
15 Reclamation’s authority under Proviso 1 to release water beyond amounts contemplated by the
16 2000 ROD that are “intended to aid the lower Klamath River (and not the Trinity River).” *Id.* at
17 1232. In contrast to the releases at issue in *Haugrud*, the releases contemplated under the WFW
18 are intended to benefit fish in the Trinity River basin and are thus limited by the amounts
19 authorized by the 2000 ROD.

20 Regarding the Proviso 2 of Section 2 of the 1955 Act, it states “[t]hat not less than 50,000
21 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt
22 County and downstream water users.” 69 Stat. at 720. Plaintiff’s comment letter referenced in
23 the Opposition contends that “[u]nder acceptable terms and conditions, the beneficiaries of
24 Proviso 2 water could agree to temporary use of that water for the winter variable flow as an
25 [Adaptive Environmental Assessment and Management] experiment.” ECF No. 110-1 at 4.
26 Proviso 2, however, was intended to provide for consumptive uses of water, not uses for fish and

27 ² The “1955 Act” is the Act of Aug. 12, 1955, Pub. L. No. 84–386 § 1, 69 Stat. 719 (1955).

1 wildlife purposes. This is apparent from the specification for use by “Humboldt County and
2 downstream water users,” in contrast to the Proviso 1, which directs the Secretary to “adopt
3 appropriate measures to insure the preservation and propagation of fish and wildlife.” The use of
4 two provisos, and use of different terms in each, suggests a different purpose for each. Proviso 1
5 is for instream flow for fishery needs, Proviso 2 is for consumptive uses. The legislative history
6 supports this reading. While much more could be said about the proper interpretation of Proviso
7 2, Westlands seeks to avoid unduly burdening the Court on an issue the other parties have not
8 briefed, and the Court likely need not reach.

9 In sum, Westlands’ position is Federal Defendants do not have authority to make releases
10 for the purposes of restoration and maintenance of the Trinity River fishery beyond the annual
11 volumes set forth in the 2000 ROD. Given the Federal Defendants’ statement at page 7 of their
12 Opposition, quoted at page 4:16-21 herein, this issue may be in dispute. Yet neither Plaintiff nor
13 the Federal Defendants have fully briefed it, neither apparently believing that the resolution of the
14 issue is necessary to decide the Motion. Westlands requests that the Court reach this issue only if
15 it is essential to do so to resolve the Motion.

16 Respectfully submitted,

17 Dated: March 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2023, I electronically filed WESTLANDS WATER DISTRICT’S REQUEST FOR LEAVE TO FILE BRIEFING AND PROPOSED BRIEFING IN RESPONSE TO PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION with the Clerk of Court using the ECF system, which will automatically send email notification to the attorneys of record.

/s/ Cynthia J. Larsen
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